No. 77-200

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID P. KAYE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 556 F. 2d 855.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1977. A petition for rehearing was denied on July 8, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on August 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether violations of Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, as amended, 29 U.S.C. 186, constitute "racketeering activity" within the meaning of 18 U.S.C. 1961(1).

2. Whether the court of appeals correctly construed the willfulness requirement of 29 U.S.C. 186 (d).

3. Whether the proof at trial impermissibly varied from the charges in petitioner's indictment.

STATEMENT

Following a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner, a union employee, was convicted on 73 counts of accepting unlawful payments from employers, in violation of 29 U.S.C. 186(b) and (d), and of conducting the affairs of the union through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). He was sentenced to two years' imprisonment on the racketeering count and to concurrent terms of three years' probation, to run consecutively to the prison term, on the remaining counts. The court of appeals affirmed (Pet. App. A).

The evidence at trial, which is set forth in the opinion of the court of appeals (Pet. App. 5-7), showed that petitioner was the part-time business agent and chief steward for trade shows of Local 714 of the Machinery, Scrap Iron Metal and Steel Chauffeurs, Warehousemen, Handlers, Helpers, Alloy Fabricators, Theatrical, Exposition, Convention and Trade Show Employees, International Brotherhood of Teamsters, which was the exclusive bargaining agent for temporary employees performing a variety of work at conventions and trade shows in the Chicago area (*id.* at 5).

As chief steward, petitioner selected union stewards for trade shows.[1] Although petitioner was not paid for

[1]Union stewards are the union's representatives on the job sites. They guard the union's jurisdiction, check crews in and out, investigate grievances, handle payroll matters, care for the safety and welfare of the crew, and ensure that the work is done smoothly. Union stewards are employees of the service contractors and are paid more than the other workers. They are expected to be present on the job site, except when excused by the employer (Pet. App. 6).

his duties as chief steward, he could properly select himself as union steward for any given job. On a number of occasions, however, petitioner accepted payment for performance of the duties of a union steward when he did not in fact perform those duties. In some instances petitioner was on the payroll of a service contractor as a union steward for a trade show in Chicago when he was not in Chicago; in others he was simultaneously on more than one payroll as union steward for different jobs in different locations (Pet. App. 6-7).

ARGUMENT

1. 18 U.S.C. 1962(c) prohibits any person from conducting the affairs of an enterprise affecting interstate commerce through a pattern of "racketeering activity," a term that is defined by 18 U.S.C. 1961(1) to include a number of state crimes as well as "any act which is indictable under" certain enumerated federal criminal statutes. The racketeering activity that formed the basis of petitioner's conviction under Section 1962(c) was his acceptance of improper payments from employers, in violation of 29 U.S.C. 186(b). Even though 29 U.S.C. 186 is among the statutes expressly listed in 18 U.S.C. 1961(1), petitioner contends (Pet. 10-14) that violations of Section 186 are not acts of racketeering because such violations are misdemeanors rather than felonies and, hence, are not "indictable" within the meaning of Section 1961. He claims that "indictable" offenses are only those that must be prosecuted by indictment and not those, such as 29 U.S.C. 186, that may be prosecuted by either indictment or information. Accordingly, petitioner argues that

Congress must have included Section 186 in the anti-racketeering statute by mistake.

The court of appeals properly rejected this argument (Pet. App. 7-9). As the court noted, there is no inconsistency between the use of the word "indictable" and the reference to 29 U.S.C. 186, because a misdemeanor may be prosecuted by indictment. See Rule 7(a), Fed. R. Crim. P. Therefore, by giving the word "indictable" in 18 U.S.C. 1961 the common-sense meaning of "may be prosecuted by indictment" instead of "must be prosecuted by indictment," both the word "indictable" and the reference to Section 186 in the anti-racketeering statute are given effect.[2]

This Court observed in *Iannelli* v. *United States*, 420 U.S. 770, 789, that the Organized Crime Control Act of 1970, of which Section 1961 is a part, is a "carefully crafted piece of legislation." In enacting Section 1961

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[2]The fallacy of petitioner's argument stems in part from his confusion of the distinction between "felonies" and "misdemeanors," which is of statutory dimension (see 18 U.S.C. 1) and may be changed by legislation, with the requirement of the Fifth Amendment that "a capital, or otherwise infamous crime" be charged by indictment. At common law the maximum punishment that designated a crime as "infamous" was punishment by imprisonment in excess of one year or at hard labor. See *United States* v. *Moreland*, 258 U.S. 433; *Parkinson* v. *United States*, 121 U.S. 281. It is therefore the maximum punishment provided for an offense, not its denomination by Congress as a "misdemeanor" or a "felony," that determines a defendant's right to be proceeded against by indictment; hence, depending upon the severity of the penalty for its violation, a crime branded by Congress as a misdemeanor may require an indictment. See *United States* v. *Moreland*, *supra*, 258 U.S. at 441; *Ex parte Brede*, 279 Fed. 147, 149 (E.D.N.Y.), affirmed *sub nom. Brede* v. *Powers*, 263 U.S. 4. Furthermore, Congress may provide that an offense that does not constitute an "infamous crime" must nonetheless be charged by indictment. See, *e.g.*, Rev. Stat. 102, 104, as amended, 2 U.S.C. 192, 194.

Congress demonstrated both an awareness of the difference between felonies and misdemeanors and an intent to include within the coverage of the statute offenses whose seriousness or relationship to organized crime justified making them elements of the racketeering offense. For example, Section 1961(1)(B) includes violations of 18 U.S.C. 659 as acts of racketeering only "if the act indictable under section 659 is felonious."[3] Consequently, the inclusion of Section 186 must be viewed not as the result of inadvertence but rather as representing a determination by Congress that violations of this statute, even though misdemeanors when committed in isolation, are sufficiently serious and sufficiently related to the operations of organized crime to warrant additional sanctions when committed as part of a pattern of racketeering activity affecting interstate commerce.[4]

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[3]Section 659, which prohibits thefts from interstate shipments, authorizes a misdemeanor penalty for theft of goods valued at $100 or less. Under petitioner's construction of Section 1961, the limiting clause with reference to Section 659 would be superfluous. This would violate the well settled rule of statutory construction that, if possible, "every clause and word" of a statute must be given effect. See, *e.g.*, *United States* v. *Menasche*, 348 U.S. 528, 538-539.

[4]Petitioner's reliance on the "policy of lenity" is misplaced. The rule that doubts as to the reach of criminal statutes should be resolved in favor of leniency is applicable only where the language of the statute is ambiguous; it should not be applied where, as here, the intent of Congress is clear. See *Scarborough* v. *United States*, No. 75-1344, decided June 6, 1977, slip op. 14; *Huddleston* v. *United States*, 415 U.S. 814, 831.

Neither is there any merit to petitioner's objection (Pet. 12-13) that since prosecutors may proceed under 29 U.S.C. 186 either by indictment or by information, they have the power to determine whether violations of Section 186 are acts of racketeering under 18 U.S.C. 1961. Section 1961 speaks in terms of "indictable" offenses, not offenses for which indictments have in fact been returned. See *United States* v. *Parness*, 503 F. 2d 430, 441 (C.A. 2), certiorari

2. Petitioner argued in the court of appeals that the government had failed to prove that he "willfully" violated 29 U.S.C. 186. In rejecting this claim, the court, relying upon *United States* v. *Inciso*, 292 F. 2d 374 (C.A. 7), and *United States* v. *Keegan*, 331 F. 2d 257 (C.A. 7), certiorari denied, 379 U.S. 828, defined a "willful violation" of Section 186 as a violation committed with either an awareness or a reckless disregard of the restrictions of that statute (Pet. App. 16-17). Petitioner contends (Pet. 14-18) that this definition is erroneous.[5]

Contrary to petitioner's argument, the requirement that the government show that a defendant acted with reckless disregard of the legality of his conduct is not a "minimal standard." The standard is a stringent one, under which the government must prove beyond a reasonable doubt not only that the defendant intentionally committed the proscribed acts, but also that he was aware that his conduct was likely to be illegal.[6] Moreover, "willfulness"

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denied, 419 U.S. 1105. Thus, even if a violation of Section 186 has been prosecuted by information, the offense remains an "indictable" one for purposes of Section 1961.

[5]Petitioner is incorrect in his assertion (Pet. 14) that under 18 U.S.C. 1962(c) a defendant may be convicted of a felony merely for committing a series of misdemeanors. Section 1962 requires proof of more than the commission of two acts of racketeering. As the court of appeals noted (Pet. App. 10), the acts must be sufficiently related to constitute a "pattern" and they must bear the requisite relationship to an enterprise affecting interstate commerce. See 116 Cong. Rec. 18940 (1970) (remarks of Senator McClellan). Here, for example, petitioner was shown to have violated 29 U.S.C. 186 on 73 separate occasions. This is therefore not a case in which the punishment is "cruelly disproportionate" (Pet. 17) to the seriousness of the offense.

[6]The court of appeals correctly found that this test had been satisfied in this case, since "a reasonable man would be aware of possible illegality in serving on multiple payrolls for the same time period where the jobs were on different floors or in different geographical locations or accepting payment for work while out of town" (Pet. App. 18).

is frequently "employed to characterize a thing done without ground for believing it is lawful * * *, or conduct marked by careless disregard whether or not one has the right so to act * * *." *United States* v. *Murdock*, 290 U.S. 389, 394-395. The court of appeals' construction of Section 186(d) is therefore consistent with the manner in which "willfulness" has been defined in the context of other criminal statutes.[7]

3. Petitioner contends (Pet. 18-22) that, although the indictment charged him with violating 29 U.S.C. 186 in his capacity as "a part-time Business Agent of Local 714," the proof showed that he received money from employers in his capacity as a union steward, and that this variance requires a reversal of his convictions. This argument is not supported by the record. Although the indictment identified petitioner as a part-time business agent of Local 714, it also charged that he had improperly accepted money "for services as a steward-employee."[8]

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[7]See, *e.g.*, *United States* v. *Illinois Central Railroad Co.*, 303 U.S. 239, 243, quoting from *St. Louis & S.F.R. Co.* v. *United States*, 169 Fed. 69, 71 (C.C.A. 8) ("we are persuaded that [willfully as used in 45 U.S.C. 73] means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements"); *United States* v. *Pomponio*, 429 U.S. 10, 11; *Screws* v. *United States*, 325 U.S. 91, 104; *United States* v. *Tolkow*, 532 F. 2d 853, 858 (C.A. 2); *United States* v. *Budzanoski*, 462 F. 2d 443, 452 (C.A. 3), certiorari denied, 409 U.S. 949; *United States* v. *Peltz*, 433 F. 2d 48 (C.A. 2), certiorari denied, 401 U.S. 955.

[8]For example, Count Two of the indictment, which is representative of all the counts charging a violation of 29 U.S.C. 186, reads as follows:

> The Special November 1974 Grand Jury further charges:
>
> That on or about the 22nd day of June, 1971, in the Northern District of Illinois, Eastern Division, David Kaye, defendant herein, being a representative of employees employed in an

As the court of appeals found (Pet. App. 12-16), that was precisely the conduct proven at trial. Hence, the evidence conformed completely to the indictment, which set forth the charges against petitioner in detail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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industry affecting commerce and an employee of a labor organization, as that term is used in Title 29, United States Code, Section 186(a) (2), that is a part-time Business Agent of Local 714, International Brotherhood of Teamsters, *did unlawfully, willfully and knowingly accept and receive money* in the amount of $225.00 from Andrews, Bartlett and Associates, Inc., The Shea Matson Co., Exhibition Contractors Co., Inc., and United Exposition Service Co., Inc., *for services as a steward-employee* in connection with three separate trade shows or exhibitions, such trade shows or exhibitions being in operation during substantially the same hours, while in fact not providing steward-employee services for any of those trade shows or exhibitions; In violation of Title 29, United States Code, Section 186(b)(1) and (d). [Emphasis added.]

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